IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

THURSDAY, THE 1ST NOVEMBER 2007 / 10TH KARTHIKA 1929

WP(C).No. 26911 of 2007(D)

O.S.257/2000 OF MUNSIFF COURT, RANNI

PETITIONER:

PHILIP.S/O. CHERIAN, AGED 72 YEARS,
KOCHUPARAMPIL HOUSE,VAYALATHALA MURI,
CHERUKOLE VILLAGE, RANNI TALUK,
PATHNAMTHITTA DISTRICT.

BY ADV. SRI. K.SHAJ,
ADV. SRI.B.BALRAJ,
ADV. SRI.SAJJU.S.

RESPONDENTS:

1. **GEORGE CHERIAN, S/O. CHERIAN,**
   KOCHUPARAMPIL HOUSE,VAYALATHALA MURI,
   CHERUKOLE VILLAGE, RANNI TALUK,
   PATHANAMTHITTA DISTRICT.

2. **ANNAMMA GEORGE,W/O. GEORGE,**
   KOCHUPARAMPIL HOUSE,VAYALATHALA MURI,
   CHERUKOLE VILLAGE, RANNI TALUK,
   PATHANAMTHITTA DISTRICT.

BY ADV. SRI.V.PHILIP MATHEW.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 01/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P.(C). NO.26911/2007:

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P.1: COPY OF THE PLAINT FILED BY THE PETITIONER IN O.S. 201/1999 ON THE FILE OF THE MUNSIFF'S COURT, RANNI.

EXT.P.2: COPY OF THE WRITTEN STATEMENT FILED BY THE R.1. IN O.S. 201/1999 ON THE FILE OF THE MUNSIFF'S COURT, RANNI.

EXT.P.3: COPY OF THE PLAINT FILED BY KUNJAMMA CHERIAN, THE MOTHER OF THE PETITIONER IN O.S. 240/1999 ON THE FILE OF THE MUNSIFF'S COURT, RANNI.

EXT.P.4: COPY OF THE WRITTEN STATEMENT FILED BY THE SAID KUNJAMMA CHERIAN, THE MOTHER OF THE PETITIONER IN O.S. 240/1999 ON THE FILE OF THE MUNSIFF'S COURT, RANNI.

EXT.P.5: COPY OF THE PLAINT FILED BY THE PETITIONER IN O.S. 257/2000 ON THE FILE OF THE MUNSIFF'S COURT, RANNI.

EXT.P.6: COPY OF THE WRITTEN STATEMENT FILED IN O.S. 257/2000 ON THE FILE OF THE MUNSIFF'S COURT, RANNI.

EXT.P.7: COPY OF THE I.A. NO. 1143/2007 IN O.S. 240/1999 OF THE MUNSIFF'S COURT, RANNI.

EXT.P.8: COPY OF THE I.A. NO. 1089/2007 IN O.S. 257/2000 OF THE MUNSIFF'S COURT, RANNI.

EXT.P.9: COPY OF THE COMMON ORDER DTD. 06/09/2007 IN I.A. NO. 1148/2007 IN O.S. 240/99 AND 1089/2007 IN O.S. 257/2000 OF THE MUNSIFF'S COURT, RANNI.

RESPONDENT'S EXHIBITS: **NIL.**

//TRUE COPY//

prv.

M.N.KRISHNAN, J

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W.P.(C) No.26911 OF 2007

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Dated this the 1st day of October 2007

JUDGMENT

This writ petition is filed to set aside the order in I.A.No.1143 of 2007 in O.S.No.240 of 1999 and I.A.No.1089 of 2007 in O.S.No.257/2000. The present petitioner is the defendant in O.S.No.240 of 1999 and the plaintiff in O.S.No.257 of 2000. For appreciating the matter, a very brief reference of the facts is necessary.

2. There was a partition deed in the family of the plaintiff and defendants in the year 1964, whereby the 4th schedule was set apart to the share of Philip and 6th schedule to George Cherian. The total extent of the property is 3 acres 1 cent. The northern half was set apart to Philip and the southern part to George Cherian. There is also a stipulation in the partition deed regarding the user of a well outside the property. A perusal of the document would further reveal that towards the end of the document, it is recited that from the centre portion of this property having an extent of 3 acres 1 cent, 1 acre is set apart to the share of Kunjamma, the mother with alienable right. It is further recited in the document that in case she dies

without executing any document or transferring the property, one portion will go to George Cherian and the other portion will go to Philip. The crux of the case so far as the plaintiff in O.S.No.257 of 2000 is concerned to the effect that when the properties had been set apart to the share of Philip and George Cherian and there is subsequent recital in the very same document it will run repugnant to the main recital and therefore an interpretation of that document will only lead to the conclusion that the mother did not have any valid right over the property. It is a matter that has to be decided by the court after evidence is over.

3. Now the crucial question which involved in these two applications is regarding a document alleged to be executed by the mother in favour of the respondents herein. It is contended in paragraph 9, grounds (d) to (f) that a document styling it as a gift deed was executed by the mother as document No.80 of 2000. In ground (f) it is very clearly recited that the first defendant is aged 96 years and she is paralytic, suffering from bodily and mental distress and that defendants 2 and 3 dominating over the Will under the peculiar circumstances got a document executed by the first defendant. It is further contended that the document is void. In the prayer portion also, the prayer is to pass a decree declaring the said document as void. In the written statement filed in the other case also, it is the very same

contention. Now by the proposed amendment, the writ petitioner wants to incorporate a paragraph whereby it is alleged that the first defendant has not executed any document and it is impersonation as a ground for declaring the document as void. During the execution of a document and avoiding the document on the ground of fraud, coercion, undue influence, etc. are different from a case where the very execution of the document is challenged contending that it is impersonated. Or, in other words, the total change in the pleading is to the effect that instead of invalidating the documents known under the provisions of the Contract Act, it is requested that a proper document is not in existence because it is not executed by the person. The two contentions are totally different and divergent also. Similarly, the legal relief when a party may be entitled also will depend upon the factors. If a document is not executed by a person then it is nonest and therefore it will not confer any title and therefore it does not require a declaration that it is void. But, if a document is executed and it is alleged that the document is vitiated for the grounds known under the provisions of the Contract Act, it becomes only a voidable document which has to be set aside. In this case, the written statement by the first defendant was filed in the year 2000 whereby they specifically raised the contention of the execution of the document. In O.S.No.257/2000 filed by the plaintiff, i.e.

the petitioner herein, it is specifically contended that the document is executed by the 96 year old mother under undue influence exerted by defendants 2 and 3 in the suit. The mother herself entered appearance in the year 2002 and filed a written statement admitting the execution of the document. Now after the mother's death in the year 2007 a petition is filed to amend the plaint to incorporate the prayer that it is an impersonated document.

4. A void document is different from a voidable document and certainly when such pleas are incorporated at a belated stage, it will prejudicially affect the right of the other party on whom a right has vested. Learned counsel for the petitioner had cited before me two decisions reported in Rajeshkumar Agarwal v. Modi(2006(3) KLT 192(SC) and in Baldev Singh v. Manohar Singh(2006(3) KLT 953(SC). In both these decisions, the principle laid down by the Apex Court is to the effect that the courts should be extremely liberal in granting the prayer for amendment of pleadings unless serious injustice or irreparable loss is caused to the other side. At the same time, it has to be stated that a plaintiff with both eyes open filing a suit specifically admitting the execution of the document and challenging it on the ground of undue influence cannot be allowed at a later stage to contend for the position that such document is not at all executed.

Further, one cannot be permitted to blow hot and cold . The amended pleadings should not go into the root of the matter and if amendment is allowed, it should not be totally a new plea which may detrimentally affect the right of the other party. In this case the bona fides in filing amendment also is doubtful for the reason that during the life time of the mother, the plaintiff never wanted to challenge the execution of the document. Only when the mother has left this world an application is filed for amending the plaint to incorporate these prayers. Under Order VI Rule 17 also there must be bona fides in filing an application for amendment.

So, from a total discussion and perusal of the entire materials available, I find that if amendment is allowed in this case it will detrimentally and prejudicially affect the right of the party on whom a right has vested and further there are no bona fides to allow those applications. Therefore the order under challenge is confirmed and the writ petition is dismissed.

M.N.KRISHNAN, JUDGE

Cdp/-